

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VICTORINA BUSTAMANTE

Claimant

VS.

NATIONAL BEEF PACKING CO.

Respondent

AND

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

Docket No. 1,063,034

ORDER

STATEMENT OF THE CASE

Claimant requested review of the Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 9, 2015. Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained a work injury of a back contusion which resolved and claimant's residual and continuing symptoms are of a personal nature. The ALJ determined claimant failed to meet her burden of proving she suffered any permanent impairment as a result of the August 26, 2010, work injury.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant contends she suffered a permanent impairment to her low back and is entitled to a 97 percent work disability.

Respondent maintains the Award should be affirmed. Respondent argues claimant's evidence is not credible, nor does it rise to the level of a preponderance of the evidence. Respondent contends claimant is not entitled to a work disability award because she failed to prove she suffered a permanent impairment .

The sole issue for the Board's review is: did claimant sustain a permanent functional impairment and/or work disability?

FINDINGS OF FACT

Claimant began employment with respondent in December 2008 as a bagger, filling and moving bags of fajita meat weighing between 8 and 10 pounds. Claimant performed this duty several times per hour. The position required claimant to twist and bend.

Claimant testified she was struck in the back with a gondola, which claimant describes as a cart with a large metal box, by a coworker on August 26, 2010,¹ injuring her low back. Claimant presented at respondent's nurse's station on August 30, 2010, where she was treated for back pain with ice, Biofreeze, and I-prin.

Claimant sought treatment with Dr. Aurora Arribas, her personal physician. Claimant testified Dr. Arribas told her she more than likely suffered from arthritis. Dr. Arribas treated claimant conservatively and eventually released claimant to work at full capacity on September 17, 2012. Claimant testified she attempted to return to respondent, but she was not accepted after she was unable to pass a physical examination.

Dr. Pedro Murati, a board certified independent medical examiner, first examined claimant at her counsel's request on December 10, 2012. Claimant complained of occasional numbness and tingling in the right foot; occasional sharp pains in the low back; low back pain going into the right leg; the inability to sit, stand, lie down, or lift heavy objects without increased low back pain; and the inability to have sex due to low back pain. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and right SI joint dysfunction. Dr. Murati recommended claimant undergo additional testing and treatment, including physical therapy and medication. He also imposed restrictions. Dr. Murati wrote, "This claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 08-26-10 during her employment with [respondent]."²

Claimant returned to Dr. Murati on March 19, 2014, at her counsel's request. Claimant's complaints remained unchanged since the December 2012 examination. After reviewing claimant's updated history, medical records, and performing a physical

¹ An Application for Hearing filed with the Division lists claimant's accident date as all days worked after August 26, 2010. Claimant originally testified during deposition her accident occurred in December 2010. She later testified at the December 11, 2013, preliminary hearing to an accident date of August 26, 2010, the date agreed upon by the parties at the regular hearing. (Application for Hearing [filed Nov. 1, 2012]; Claimant's Depo. at 10; P.H. Trans. [Dec. 11, 2013] at 5; R.H. Trans. at 4.)

² Murati Depo., Ex. 2 at 3.

examination, Dr. Murati concluded claimant continued to have low back pain with signs of radiculopathy and right SI joint dysfunction. He imposed the following permanent restrictions: no bending, crouching, crawling, or stooping; no lifting, carrying, pushing or pulling greater than 20 pounds, occasionally 20 pounds and frequently 10 pounds; rarely climb stairs, ladders or squat; occasional sitting; frequent walking and standing; and alternate sitting, standing and walking. Dr. Murati recommended claimant receive annual follow-up examinations for her low back.

Using the *AMA Guides*,³ Dr. Murati placed claimant in Lumbosacral DRE Category III for a 10 percent whole person impairment related to her low back pain with signs of radiculopathy. Dr. Murati explained his rating was based on claimant's physical examination. He testified:

[Claimant] had low-back pain with radiculopathy, which were – if you look at the Guides, you know, you have to have relevant findings of missing reflexes, which in this case . . . both ankle jerks were missing. She also has loss of sensation along the right S1 dermatome, which is another finding for radiculopathy. She also has a weak right great toe extensor, which is organic weakness, which is also caused by the radiculopathy, so she had three findings of radiculopathy, which places her at the DRE III Category for 10 percent.⁴

Dr. David Hufford, an orthopedic and sports medicine physician, examined claimant for purposes of a court-ordered independent medical evaluation (IME) on June 18, 2013. Dr. Hufford reviewed claimant's history, medical records, and performed a physical examination, determining claimant had a work-related low back contusion and right knee pain. Dr. Hufford opined claimant's low back pain was the result of chronic and degenerative lumbar spine disease and possibly osteopenia/osteoporosis. He further stated claimant appeared "to have experienced an acute injury which was treated to resolution as documented in the medical record."⁵ Dr. Hufford determined claimant appeared to have significant preexisting degenerative osteoarthritis in the knee not related to any specific injury. Dr. Hufford recommended no work restrictions related to a work injury.

Dr. Hufford never referred to an accident date of August 26, 2010, in his IME report. Dr. Hufford testified claimant gave a history of having been struck in the back by a gondola in January 2010 while working at respondent. Dr. Hufford found claimant to be a "less than

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁴ Murati Depo. at 22.

⁵ Hufford Depo., Ex. 2 at 2.

reliable historian.”⁶ Based upon his review of claimant’s records, Dr. Hufford noted in his report an actual accident date of December 29, 2009. Dr. Hufford testified, “I don’t recall that I saw anything in the record . . . except in Dr. Murati’s IME where he refers to another work injury that occurred in August of 2010, I believe.”⁷

In response to a joint letter, Dr. Hufford submitted a follow-up report to the ALJ dated October 9, 2013, in which he clarified his position:

I do not believe that [claimant’s] work has caused the degenerative arthritic change in her lumbar spine or right knee. I do not believe that her work has accelerated or advanced her condition due to any acute injury or repetitive activity. I do not believe that her work through any acute injury or repetitive activity has aggravated her degenerative disc disease and facet arthropathy in the lumbar spine nor preexisting degenerative osteoarthritis in the right knee. I believe she had an acute myofascial tissue injury to the lumbar spine in 2009 and that this injury resolved to an asymptomatic level without impairment or residual symptoms based on documentation in the records provided.⁸

Paul S. Hardin, a vocational consultant, interviewed claimant on March 19, 2014, at claimant’s counsel’s request. Mr. Hardin discussed claimant’s job history for the 15-year period prior to August 2010, which consisted of three unskilled, manual labor jobs. Using information gathered from both claimant and Dr. Murati’s report, Mr. Hardin completed a Task Performance Capacity Assessment Form dated April 4, 2014. Dr. Murati reviewed the task list generated by Mr. Hardin. Of the 15 unduplicated tasks on the list, Dr. Murati opined claimant could no longer perform 14, for a 93.3 percent task loss.

Dr. Murati’s report dated March 19, 2014, was the only medical report reviewed by Mr. Hardin. Mr. Hardin agreed that if he were provided a medical opinion of no work restrictions, he would be unable to perform a task assessment because there would be no task loss.

Claimant is a 60-year-old woman who completed the sixth grade in Durango, Mexico. She has no GED and no formal education or training. Claimant cannot read, write, or speak English, though she can understand a limited amount. Mr. Hardin opined that the combination of claimant’s age, limited education and training, limited knowledge of English, and restrictions imposed by Dr. Murati rendered her unable to obtain or perform

⁶ *Id.* at 1.

⁷ Hufford Depo. at 6.

⁸ *Id.*, Ex. 3 at 1.

substantial, gainful employment. He testified claimant “has a 100 percent loss and is essentially and realistically unemployable.”⁹

Mr. Hardin noted claimant was unemployed at the time of the interview. He testified he did not ask claimant if she had looked for work since her last day at respondent. Mr. Hardin stated claimant informed him she was taken off work by a doctor in October 2011 and was terminated by respondent a year later. Mr. Hardin did not know the terms of claimant’s termination, only that she was terminated as of October 28, 2012.

Claimant testified at the regular hearing her last day worked at respondent was October 11, 2011.¹⁰ Claimant stated she has not worked anywhere since leaving respondent. She indicated she has not applied for employment elsewhere because of her health.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) states:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

ANALYSIS

In her Award, the ALJ wrote:

The claimant did sustain a work injury of a back contusion which resolved. Her residual and continuing symptoms are of a personal nature. After considering the

⁹ Hardin Depo. at 15.

¹⁰ Claimant previously testified her last day worked was November 14, 2011. (Claimant's Depo. at 14.)

entire record, it is found that the claimant has failed to meet her burden of proof that she suffered any permanent impairment and therefore the requested award of compensation is denied.¹¹

The Board agrees. Dr. Hufford, the court-appointed neutral examining physician, did not believe claimant's gondola injury accelerated or advanced her degenerative spine condition. Dr. Hufford believed claimant suffered an acute myofascial tissue injury to the lumbar spine from the gondola injury, which resolved to an asymptomatic level.¹²

Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and right SI joint dysfunction, and related all his diagnoses to the August 26, 2010, work-related accident. Dr. Murati testified claimant provided a history of two low back injuries occurring prior to the August 26, 2010, work-related accident.¹³ Dr. Murati noted Dr. Arribas' diagnosis of degenerative disc disease on September 22, 2010.¹⁴ Dr. Murati acknowledged an MRI revealed degenerative lumbar spine disease.¹⁵ Dr. Murati does not account for the involvement of claimant's preexisting condition in his analysis of permanent impairment.

The Board gives more weight to the opinions of Dr. Hufford than those of Dr. Murati. Dr. Hufford's opinions are consistent with both claimant's testimony that it was her understanding Dr. Arribas thought her low back problems were due to arthritis and Dr. Murati's acknowledgment of claimant's history of prior low back injuries and documentation of degenerative lumbar spine disease.

CONCLUSION

Claimant has failed to meet the burden of proving she suffers a permanent low back injury arising out of and in the course of her employment with respondent. All other issues are moot.

¹¹ ALJ Award (Jan. 26, 2015) at 7-8.

¹² See Hufford Depo. at 14-15. While Dr. Hufford referred to a 2009 accident, his evaluation was based on the assumption that the reference was to the injury where the gondola struck claimant in the back, which occurred on August 26, 2010.

¹³ See Murati Depo. at 17.

¹⁴ See *Id.*, Ex. 2 at 1.

¹⁵ See Murati Depo. at 23.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 26, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge